U.S. Department of Labor

Office of Administrative Law Judges
50 Fremont Street
Suite 2100
San Francisco, CA 94105

(415) 744-6577
(415) 744-6569 (FAX)

Issue Date: 17 January 2003

Case №: 2001-LHC-3111
OWCP №: 18-68647

In the Matter of:

Alex Escoboza,
Claimant

vs.

Container Stevedoring Co.,
Employer (self insured)

and

F.A. Richard & Assoc.,
Third Party Administrator.

Appearances:

Rodney C. Pranin, Esq.
Pranin & Muldoon,
For Claimant

Daniel Valenzuela, Esq.
Samuelsen, Gonzalez, Valenzuela, Brown & Mann
For Employer

Before: William Dorsey
Administrative Law Judge

DECISION AND ORDER

I. Background

Alex Escoboza ("Claimant") is a 47 year old longshoreman. He was working as a top handler vehicle driver for Container Stevedoring ("Employer") at the time of his alleged work-related injury. He seeks medical benefits and disability compensation under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901, *et seq.*, as amended by the Longshore and Harbor Workers' Compensation Act Amendments of 1984, Pub. L. No. 98-426, 98 Stat. 1639-1655 (1984) ("the Act"), for injuries to his lower back that he allegedly suffered on July 25, 1998 while working at Container Stevedoring, which is self-insured. F.A. Richard, Inc. acts as its third party administrator.

Claimant argues that under Section 8(c)(21) of the Act, Employer should pay Claimant disability payments at the maximum compensation rate of $835.58 per week for two periods of temporary partial disability (namely, February 21, 1999 to April 28, 1999, and June 21, 2000 to September 2, 2000) and for the period of permanent partial disability of 104 weeks (namely, from September 28, 2000[1] to September 25, 2002). He believes that his post-injury actual earnings of $1,269.15 per week fairly represent his post-injury wage earning capacity, and that this figure should be subtracted from the stipulated pre-injury average weekly wage of $2563.53 per week to equal $1294.38 per week, thereby triggering the maximum compensation rate under the Act. He also seeks medical benefits for all costs resulting from the accident, as well as attorney's fees and costs.

On the other hand, Employer argues that Claimant's actual post-injury earnings do not fairly represent his wage earning capacity and that under Section 8(h) of the Act, his post-injury earning capacity is $2,115.00 per week. Accordingly, Employer argues that it is only liable to Claimant for a permanent partial disability award of $299.02 per week. Employer also believes that the period of permanent partial disability should run no later than June 20, 2000, rather than the date proposed by Claimant. Finally, Employer notes that it is entitled to Section 8(f) relief under an agreement it reached with the Director, Office of Worker's Compensation Programs on July 2, 2001.

This case went to hearing on May 7, 2002 and May 10, 2002 in Long Beach, California. Claimant's Exhibits ("CX") 1-7 and Employer's Exhibits ("EX") 1-19 were admitted into evidence at that time. Both Employer and Claimant were represented by counsel at the hearing. Employer and Claimant filed post-hearing proposed decision and orders on September 16, 2002 and September 20, 2002, respectively. The Director, Office of Worker's Compensation Programs, a party-in-interest who did not appear at the trial or file a statement, reached the aforementioned agreement with Employer in which it approved Section 8(f) relief under certain stipulations. *See* EX 11.

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[1]September 28, 2000 represents the date that Claimant's treating physician found his condition to be "permanent and stationary" a term essentially synonymous in California workers' compensation practice with maximum medical improvement.

I find that Claimant's condition was permanent and stationary as of March 29, 2000, and that for a variety of reasons, the actual wages that he has been paid since the July 28, 1998 accident do not fairly and reasonably represent his post-injury wage earning capacity. I agree with Employer that as of this date, Claimant had the capacity to work 5 days per week as a marine clerk at a wage rate of $2,115.00 per week. After the proper calculations have been made, this means Claimant should be compensated at a rate of $299.02 per week for the two periods of temporary partial disability and for the 104 weeks of permanent partial disability, beginning March 29, 2000. Thereafter, liability lies with Special Fund. Finally, Claimant's request for attorney's fees is granted, as his attorney succeeded in establishing Claimant's entitlement to permanent disability benefits from March 29, 2000 until March 25, 2002, since Employer had discontinued paying those benefits as of June 20, 2000. This constitutes a successful prosecution of the case under the Act.

II. Issues for Adjudication

The case presents these issues:

1. Whether Employer owes Claimant temporary disability benefits for a loss of earning capacity resulting from the July 25, 1998 injury.

2. Whether Employer owes Claimant permanent disability benefits for a loss of earning capacity from the July 25, 1998 injury.

3. Whether Employer owes any medical expenses related to the injury of July 25, 1998.

4. Whether Employer is entitled to Section 8(f) relief.

5. Whether Employer owes Claimant payment of attorney's fees and costs under Section 28 of the Act.

III. Findings of Fact

Most of the facts in this case are undisputed and have been stipulated to by the parties. Under 29 C.F.R. § 18.51,[2] I accept these stipulations into evidence, as corrected, and they are binding upon the parties.

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[2]This section states in pertinent part:

The parties may by stipulation in writing at any stage of the proceeding, or orally made at hearing, agree upon any pertinent facts in the proceeding. . . . Stipulations may be received in evidence at a hearing or prior thereto, and when received in evidence, shall be binding on the parties thereto.

Claimant is a 47 year-old longshoreman and the father of three children from two different marriages. He completed high school and was a part-time student at Harbor College for two years. TR at 12-13. He began to work on the waterfront as a casual laborer in 1984, became a union member (i.e., got his B-book) in 1987, and qualified for his A-book in 1991. TR at 14-15. He had other injuries before the one in this case, including a head injury, fractured clavicle and fractured fourth vertebra in 1980, EX 10 at 37, a lower back injury in 1984 or 1985, and a work related injury resulting in a laminectomy and discectomy at L5-S1 in 1994. EX 10 at 37-39; EX 18 at 64. Claimant returned to work following these injuries, driving a top handler vehicle from 1991 until 1998, when the accident occurred.

On July 25, 1998, at Container Stevedoring's facilities, Claimant drove a top handler into the beam of a crane towards the end of the night shift. He injured his cervical and lumbar spine. TR at 18-19. Claimant heard a pop in his back and felt immediate pain upon impact. TR at 20. He returned the top handler to the mechanic that night, saw his supervisor, and was told he could fill out an accident report the following day. TR at 22. Claimant awoke the next day with severe pain in his back, and received a doctor's slip taking him off work. Claimant's average weekly wage (AWW) at the time of the accident was $2,563.53 per week.

Claimant was evaluated and treated on July 29, 1998 by James M. Loddengaard, M.D., an orthopaedic surgeon practicing in Torrance, California. CX 3 at 52. Dr. Loddengaard diagnosed Claimant with lumbosacral strain with right S1 radiculitis; left-sided cervical strain; a history of previous cervical and lumbar disc surgery with successful result; a C3-4 autofusion; and disc degeneration L5-S1, L4-5. *Id.* at 51. Dr. Loddengaard placed Claimant on temporary total disability as of July 26, 1998, and referred Claimant for an MRI of the back, which was performed on August 6, 1998. *Id.*, CX 7 at 88-90. The doctor noted in a report dated September 16, 1998 that Claimant had a recurrent right L5-S1 disc herniation with persistent right S1 radiculopathy and that physical therapy was not helping. He recommended that Claimant have surgery. CX 3 at 47.

Dr. Loddengaard performed a right L5-S1 laminotomy and discectomy on Claimant on October 22, 1998. CX 3 at 44; Deposition of Dr. Loddengaard at 8. He released Claimant to return to light duty work on February 18, 1999, with a restriction of no lifting over 30 pounds and no repetitive bending or stooping. *Id.* at 9. Claimant worked without incident until April 27, 1999.

Dr. Loddengaard re-evaluated Claimant on April 28, 1999, and once again diagnosed Claimant with recurrent right S1 radiculitis, which he described as "ominous" and worthy of investigation. CX 3 at 40. A second MRI revealed a recurrent disc protrusion. CX 3 at 35. Dr. Loddengaard recommended a second surgery, which would include a fusion at the L5-S1 level. Deposition of Dr. Loddengaard at 8-10.

Dr. Loddengaard performed another surgery, a discectomy and a fusion at the L5-S1 level, on July 7, 1999. *Id.* Physical therapy followed from November 1999 to December 1999 but was discontinued because it did not help Claimant. Deposition of Dr. Loddengaard at 13. Dr.

Loddengaard released Claimant to work on June 20, 2000[3] with a restriction of no lifting over 20 pounds and no repetitive bending or stooping; however, he did not declare Claimant's condition to be permanent and stationary until September 28, 2000 because he wanted to establish a "track record" of work. CX 3 at 8. He testified at his deposition that Claimant should work three to four days a week. Deposition of Dr. Loddengaard at 21-22.

Claimant was also evaluated several times on behalf of the Employer by James London, M.D., a board certified orthopaedic surgeon. Dr. London agreed with most of the material findings of Dr. Loddengaard, assessing roughly the same work restrictions as those set by Dr. Loddengaard. Dr. London found Claimant's condition to be permanent and stationary at the earlier date of March 29, 2000, which he documented in a report of April 3, 2000. *See* EX 5 at 15. Dr. London disagreed with Dr. Loddengaard in that he believed Claimant could work five days a week without physical harm. Deposition of Dr. London at 16.

Claimant returned to work once again on June 20, 2000. From that date, he has worked either as a signalman or as a marine clerk. Clerks jobs like the ones Claimant worked between June 20, 2000 and December 2001 typically pay more than signalmen jobs. Marine clerks are organized in a separate union; those jobs are offered first to its members, and then to longshore union members, who typically fill 45-50% of the clerk jobs. In essence, there are not enough members of the marine clerks union to staff all the positions employers require. Claimant testified that he was paid for 10-12 hours of work per shift as a marine clerk, although he actually only performed 8 hours of work. TR at 43. Claimant also testified that he generally worked three to four days a week at this rate, but that whether he reported to the hiring hall for work depended on how his back felt in each morning. TR at 47.

On December 18, 2001, Claimant was involved in an incident while working as a marine clerk at Maersk. Maersk filed a complaint against him that day, which was served on him roughly a month later. According to the complaint, Claimant appeared to Joe Uranga, another clerk, to be having a seizure. Claimant's supervisor, Mark Davids, investigated the report, and smelled alcohol on Claimant's breath. TR at 53. Claimant had been drinking alcohol the night before while watching Monday Night Football with friends. TR at 48. Paramedics were called to the scene and reported that they smelled alcohol on Claimant's breath. Claimant was taken by his business agent to St. Mary's, where a urine sample was taken. EX 19. The results of that sample indicated that Claimant's blood alcohol level was 0.1 percent. *Id*. On January 8, 2002, Maersk suspended Claimant from further work as a marine clerk due to the December 18, 2001 incident. Claimant maintains that he was taking medication without food during this incident, which caused him to become dizzy. TR at 52.

[3]As far as I can tell from the record, this is the date when Employer discontinued paying benefits to Claimant.

Under Sections 17.81, 17.829 and 829 of the collective bargaining agreement ("PCL&CA) between the Pacific Maritime Association (PMA) and International Longshore Workers Union (ILWU), there is a strict no tolerance policy for drug and alcohol offenses.

An initial meeting of the Labor Relations Committee ("LRC") was held on February 26, 2002 to make a determination on his suspension as a clerk (i.e., from working jobs outside his own union). At that meeting, Claimant testified that he had been drinking the night before while watching Monday Night Football, but that he did not feel intoxicated on the job. EX 19. At a subsequent meeting on April 16, 2002, the LRC found that Claimant was guilty under Section 17.829 of the PCL&CA and that he was required to see Jackie Cummings, the Southern California Alcohol/Drug Recovery Program representative. EX 19 at 70. Further, the Committee held that Claimant was disqualified from performing the work of a marine clerk until it received a letter from Ms. Cummings. *Id.* The contract requires that all disputes between parties go to arbitration. Claimant continues to dispute that he was under the influence of alcohol at work, but the parties have been unable to agree on an arbitrator to determine if Claimant was intoxicated or medicated when he was disqualified.

Captain Tom Lombard, a retired labor relation manager for American President Lines, testified at trial. He was rehired after retirement as a contract employee to teach labor relations and safety, and is familiar with the labor contracts between the waterfront employers and the unions, and with their procedures. Punishment such as suspension from work for drug and alcohol infractions would be meted out by the longshore board, i.e., the board for the union of which Claimant is a member. This is a different body than the LRC, which barred him from marine clerk work. According to Captain Lombard, the longshore board drops the complaint at the first meeting if the violator meets with Ms. Cummings. Captain Lombard testified:

> [W]hen the guilt has been established, all he has to do is show up to Miss Cummings. He doesn't even have to attend [a drug or alcohol program], just show up. She writes a letter back saying that, "Yes, he attended," and then he's off. So it is not in our power at all to allow him to become a clerk. It's only in Mr. Escoboza's power to become a clerk.

TR at 159.

The parties also stipulated at trial that Claimant was twice convicted of driving under the influence of alcohol -- on September 5, 1996 and again on May 23, 1997. TR at 123.

Employer paid temporary total disability benefits from July 26, 1998 to February 21, 1999, and from April 28, 1999 to June 20, 2000 in the amount of $835.74 per week. The parties then disputed when Claimant had reached maximum medical improvement.

At the time of the hearing, Claimant was working as a signalman, taking jobs available from the longshore union' Carpenter Board because he was still ineligible for marine clerk positions as a

result of the December 18, 2001 incident. Claimant's AWW at the time of the hearing was $1,269.15, which was less than what he would make if he was qualified to perform jobs a marine clerk.

IV. Conclusions of Law

The parties agree that an employment relationship existed between Claimant and the Employer at the time of the alleged injury and that Claimant and Employer are subject to the jurisdiction of the Act. Further, they agree that Claimant gave timely notification of the injury to Employer and timely filed a claim for compensation against Employer. The main issues for me to determine in this case are the date that Claimant reached maximum medical improvement (MMI), and what Claimant's wage earning capacity was following the July 25, 1998 accident.

A. Maximum Medical Improvement

Claimant argues that under the decision in *Amos v. Director, OWCP*, 153 F.3d 1051 (9th Cir. 1998), I must defer on this issue to the opinion of Claimant's treating physician, Dr. Loddengaard, rather than that of Dr. London. He therefore believes that the date of MMI should be set as September 28, 2000. Employer, on the other hand, argues that the date of MMI should fall no later than June 20, 2000, when Dr. Loddengaard released Claimant to return to work. Employer also argues that this date is suitable because it is somewhere between the dates that Drs. London and Loddengaard found Claimant to be permanent and stationary.

The date on which a claimant's condition has become permanent is primarily a medical determination. The medical evidence must establish the date on which the injured employee healed to the extent that his condition will not improve. *Trask*, 17 BRBS at 60 (1985); *Mason v. Bender Welding & Mach. Co.*, 16 BRBS 307, 309 (1984); *Rivera v. National Metal & Steel Corp*., 16 BRBS 135, 137 (1984). A claimant is considered permanently disabled only "when [a claimant's] condition has continued for a lengthy period, and it appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period." *SGS Control Services v. Director, Office of Workers' Compensation Programs*, 86 F.3d 438, 443-44 (5th Cir. 1996).

The Ninth Circuit gave controlling weight to the treating physician's opinion about whether his patient should undergo shoulder surgery in *Amos*, because that physician "is employed to cure and has a greater opportunity to know and observe the patient as an individual." *Id.* (quoting *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th Cir. 1989). That claimant had fallen over a railroad tie at work and injured his shoulder when struck in the face by a steel bar. The employer's insurance company and its examiner thought surgery on the shoulder was unnecessary, but the treating physician and the claimant believed otherwise. The Ninth Circuit found that the administrative law judge had no role in choosing among reasonable treatment options. An injured worker and treating doctor may pursue a reasonable, although debatable, course of medical treatment without interference by the employer or review by an administrative law judge. The

facts of the case did not involve, nor did the court discuss, whether deference was due to a treating doctor's selection of a date for maximum medical improvement.

To the extent that Claimant asks me to defer to the treating doctor on this issue based merely on that doctor's status, I decline to do so. I read *Amos* only to require deference to the treating doctor when choosing among treatment options. On other issues, including setting the date when a claimant reaches MMI, no doctor's opinion comes into evidence with a presumption of accuracy. The weight due to a physician's opinion depends on its power to persuade, not on the doctor's status.

Dr. Loddengaard explained that he returned Claimant to work on June 20, 2000, but did not declare his condition permanent and stationary until September 28, 2000 because he wanted to establish a "track record" at work for Claimant. Deposition of Dr. Loddengaard at 34. Claimant's capabilities from June through September remained the same, they did not improve. *Id.* at 35. This indicates to me that Claimant had reached maximum medical improvement in June. I find Dr. Loddengaard's opinion unreliable in part because, as I will explain below, he relies too heavily on Claimant's statements, which I find to lack credibility. Dr. Loddengaard's opinion therefore has little persuasive power.

Employer was willing to set the date of maximum medical improvement as late as June 20, 2000, when Dr. Loddengaard released Claimant to work. Yet the Act disallows me from settling on such a "compromise" or "midway" position, as Employer recommends. The date of maximum medical improvement is primarily a medical determination, and it should occur when a claimant's condition does not appear to be improving.

The other opinion from which I can determine the date of MMI comes from Dr. London, who found that Claimant's condition was permanent and stationary for purposes of rating as of March 29, 2000 in his report of April 3, 2000. *See* EX 5 at 15. He grounded his opinion in objective medical evidence, namely that there were no post-operative problems following the July 1999 surgery, and no significant findings on the EMG or nerve conduction studies. Although Dr. London instructed Claimant to complete his home exercise program and to refrain from returning to work for four weeks after the date of his report, this date still stands out to me as the date of maximum medical improvement because it was chosen by a medical professional from objective data, and not by Claimant himself.

B.Wage earning capacity

Having established that Claimant is entitled to permanent disability benefits as of on March 29, 2000, I must determine Claimant's wage earning capacity, which is defined as "an injured employee's ability to command regular income as the result of his personal labor." *Seidel v. General Dynamics Corp.*, 22 BRBS 403, 405 (1989).

Claimant argues that he can only work three days a week for several reasons. First, Claimant testified at trial that he could only work three or four days per week due to the pain he experienced. TR at 47. Second, Dr. Loddengaard opined that Claimant could only work three or four days per week with given restrictions as well. Deposition of Dr. Loddengaard at 21-22.

Employer asserts that Claimant can work five days a week as a marine clerk, at a job that carries a twenty five percent premium over the base wage set in the collective bargaining agreement. They base their argument on the testimony of Dr. London, who believed that Claimant could work a full-time, 40 hour work week, and that he could even work seven days per week. Deposition of Dr. London at 23-24.

Section 8(h) of the Act provides:

> The wage-earning capacity of an injured employee in cases of partial disability under subdivision (c)(21) of this section or under subdivision (e) of this section shall be determined by his actual earnings if such actual earnings fairly and reasonably represent his wage-earning capacity. Provided, however, that if . . . his actual earnings do not fairly and reasonably represent his wage-earning capacity, the deputy commissioner may, in the interest of justice, fix such wage-earning capacity as shall be reasonable, having due regard to the nature of his injury, the degree of physical impairment, his usual employment, and any other factors or circumstances in the case which may affect his capacity to earn wages in his disabled condition, including the effect of disability as it may naturally extend into the future.

Section 8(h) requires a two-part analysis to determine the claimant's post injury wage earning capacity. *See Devillier v. National Steel & Shipbuilding Co*. 10 BRBS 649, 660 (1979). The first inquiry focuses on whether the claimant's actual post-injury wages reasonably and fairly represent his wage earning capacity. *Randall v. Comfort Control, Inc.*, 725 F.2d 791, 796, 16 BRBS 56, 64 (CRT) (D.C. Cir. 1984). If the actual wages do not represent the claimant's wage earning capacity, the second inquiry requires me to arrive at a dollar amount which fairly and reasonably represents the claimant's wage earning capacity. *Id.* at 796-97, 16 BRBS at 64. If the claimant's wages are representative of his wage earning capacity, the second inquiry need not be made. *Devillier*, 10 BRBS at 660.

I find that Claimant's actual earnings do not fairly and reasonably represent his capacity to earn wages. Among the many factors that I must take into account when making this determination,[4]

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[4]These include the claimant's physical condition, age, education, industrial history, and number of hours and weeks actually worked per year, *see Abbott v. Louisiana Ins. Guaranty Ass'n*, 27 BRBS 192 (1993), *aff'd*. 40 F.3d 122 (5th Cir. 1994). Most, if not all of the factors weigh against Claimant. Claimant is still relatively young (47 years old), has substantial industrial history in longshore work, and worked between three and five days per week, showing that, he is

I consider the availability of employment after the injury to be one of the most important. Employer has carried its burden of showing that work is available five days per week if Claimant wants it, and that Claimant is capable of working five days per week.

First, there is no doubt that clerk work is available to Claimant on a full time basis. Captain Lombard established that if Claimant were well enough and had the desire to return to work as a marine clerk, he could find such work. TR at 175. According to Captain Lombard, the only thing limiting Claimant from returning to full time work was Claimant's health and desire to return to work. TR at 159. I address these in turn.

Claimant's health does not limit his ability to work five days or more per week. Both Drs. Loddengaard and London found that Claimant was able to work safely as a marine clerk under the physical restrictions they imposed; the difference in their views on Claimant's physical limitations was negligible. They differed about the number of days per week Claimant could work. Dr. Loddengaard thought Claimant could work three or four days per week, while Dr. London thought he could work at least five, and up to seven days per week. Dr. Loddengaard offered several explanations to account for this difference, none of which I find convincing. First, Dr. Loddengaard stated he set the three or four days per week figure to prevent Claimant from suffering further aggravation to his condition or a new injury. Deposition of Dr. Loddengaard at 25. But as Dr. London explained, every doctor purports to prevent further aggravation or injury by imposing physical restrictions, whether they are for three days per week or five days per week. Deposition of Dr. London at 18. Therefore, Dr. Loddengaard must offer another reason why I should credit his opinion over Dr. London's.

Dr. Loddengaard also testified in his deposition that in making his decision about how many days Claimant could work, Dr. Loddengaard took his cues from Claimant. Deposition of Dr. Loddengaard at 21. Dr. Loddengaard stated that "[i]f [Claimant] said that he can work five days a week and his condition isn't materially worse because of that, I would say great, work five days a week, and if they can't, then they can't." *Id.*

The major problem with this approach is that I doubt the accuracy and sincerity of Claimant's testimony, and hence his credibility, while Dr. Loddengaard does not. Claimant demonstrated self-serving selective memory on more than one occasion during the hearing. Claimant steadfastly maintained that he was not intoxicated and he stubbornly refused to take time off from work or to meet with Jackie Cummings, TR at 61-62, even after the test results had shown his blood alcohol level to be above the legal limit in California. This damages his believability. The way he and his union representative have tried to reframe the question is: "Why would you punish [Claimant] for 'Monday Night Football'?"[5] TR at 61. But that is not and never has been the question.

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well enough to perform work a majority of the time.

[5]The answer to this is quite clear: Claimant is not being punished for watching "Monday Night Football." Rather, he is subject to discipline for showing up intoxicated to work, so

Claimant's credibility was also impeached when he testified that he did not have problems with alcohol in the past, TR at 98, only to be proven wrong when the parties stipulated to two recent DUI convictions. Finally, Claimant testified that he did not want to take off 15 days from work as punishment for intoxication on the job because he did not want to "take food off [his] kids' table." Yet that is in effect what he is doing by his obdurate refusal to meet with Jackie Cummings. He continues to work as a signalman – which pays less than marine clerk jobs – because he remains ineligible to work as a clerk. As Captain Lombard testified, if Claimant had admitted guilt for the drinking incident and merely met with Jackie Cummings, the suspension period would have been waived and he could have returned to the higher paying clerk jobs, to the economic benefit of his family. TR at 171. Claimant's doggedness in denying what the blood alcohol test results make undeniable prevents him from returning to work at a higher paying scale. Moreover, economic dis-incentives such as suspending workers who attend work while impaired by alcohol are appropriate means to achieve safety for all those working on the waterfront.

Because of these warped perceptions, I doubt Claimant's accuracy and sincerity. This leads me to give little weight to Claimant's assertion that he could only work three to four days per week, and therefore to reject Dr. Loddengaard's opinion, which is based on Claimant's subjective assessment of his capabilities. I accept instead the opinion of Dr. London, who believed Claimant was exaggerating the number of days he could not work. Deposition of Dr. London at 25. Dr. London found Claimant capable of working up to seven days per week, an opinion adequately supported by objective medical evidence. Deposition of Dr. London at 23-24.

Marine clerk work was available to Claimant and well within his capabilities. It was Claimant's choice not to do it, and he cannot expect to obtain a higher award due to his self-limiting behavior.

Since his actual wages do not represent Claimant's wage earning capacity, I address the second inquiry in this analysis, and set a dollar amount which fairly and reasonably represents the wage earning capacity. The party that contends that the Claimant's actual wages are not representative of his wage earning capacity has the burden of establishing an alternative reasonable wage earning capacity. *J.M. Martinac Shipbuilding v. Director, OWCP*, 900 F.2d 180, 23 BRBS 127 (CRT) (9th Cir. 1990).

Employer suggests a wage earning capacity based on the number of days Claimant worked in 2001 (155) as a percentage of the possible work days in a calendar year (260), and Claimant's

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impaired that he called attention to himself by seeming to have a seizure. This is an express violation of the contract between the PMA and the union. If he got so inebriated watching Monday Night Football that his blood alcohol level was what it measured the next morning when the business agent took him from work, he was drinking a great deal. Given his prior convictions for driving while he had an unauthorized blood alcohol levels, I believe he underestimates his drinking and its effects. His refusal to even meet with Jackie Cummings, and thereby re-qualify for higher paying marine clerk jobs, demonstrates his denial of his alcohol problem.

average post-injury wages for the days he worked ($1269.00 per week). Since Claimant worked roughly 60% of the total time that he could have worked, this comes out to three days per week and produces a daily wage earning capacity of $423.00 ($1269.00 / 3 days per week). Multiplying $423.00 by the number of days which Claimant can actually work (5) yields a result of $2,115.00. This figure more accurately represents Claimant's wage earning capacity following his July 25, 1998 injury.

Claimant's post-injury actual wages were not representative of his wage earning capacity. Employer has carried its burden of showing an alternative method to calculate Claimant's wage earning capacity which fairly and reasonably represents his wage earning capacity. The District Director should make the appropriate calculations based on these figures as to what Claimant's permanent disability relief should be.

C. Section 8(f) relief

The OWCP has stipulated that Section 8(f) relief is appropriate based on an MMI date of September 28, 2000. EX 11 at 39-40. This decision is supported by the record, which shows that Claimant has had prior lower back injuries in 1993 and 1994, and by Dr. London, who opined that Claimant had a pre-existing impairment in the low back prior to the July 25, 1998 injury. Deposition of Dr. London at 14-15. According to Dr. London, then, Claimant's injury was materially greater because of the pre-existing injury. *Id.*

The Special Fund is ordered to make permanent partial disability payments at the rate of $299.02 per week. These payments should commence after the 104 week period of permanent partial disability paid by Employer, which started on March 29, 2000 and continued until March 26, 2002. The Special Fund must therefore make payments retroactively starting on the latter date.

It may trouble The Director, OWCP that I have actually set Claimant's MMI date 6 months earlier than what was agreed upon in that letter. This concern should be mitigated by the fact that I found the rate of permanent partial disability to be well below the maximum rate agreed upon by OWCP. If, however, OWCP chooses to object to making disability payments starting on the earlier date and at a lower rate, then it may request a separate hearing to resolve this matter.

D. Attorney's Fees and Costs

Section 28 of the Longshore Act provides for an award of attorney's fees and costs when the claimant's attorney has engaged in "successful prosecution" of a claim. 33 U.S.C. § 928(a); 20 C.F.R. § 702.134(a); *Perkins v. Marine Terminals Corp.*, 673 F.2d 1097 (9th Cir. 1982); *Rogers v. Ingals Shipbuilding, Inc.*, 28 BRBS 89 (1993); *Harms v. Stevedoring Services of America*, 25 BRBS 375 (1992); *Kinnes v. General Dynamics Corp.*, 25 BRBS 311 (1992).

Although Claimant's attorney failed to establish the date of maximum medical improvement and to obtain the amount of disability for Claimant that he had requested, he did succeed in obtaining

some permanent disability benefits for his client. As far as I can glean from the record, Employer discontinued disability benefits to Claimant as of June 20, 2000. Only by prosecuting and taking this case to hearing did Claimant's attorney succeed in obtaining benefits for his client from March 29, 2000 until March 26, 2002. This result constitutes a successful prosecution of the case under the Act.

As such, Claimant's request for attorney's fees is granted. Counsel for Claimant is allowed twenty days from the date of service of this decision by the District Director to submit a petition for attorney's fees (or form service of the disposition of a petition for reconsideration, should one be filed). Respondents have ten days following the receipt of such an application in which to file any objections.

V. Order

It is hereby ORDERED that:

1. Employer shall pay Claimant temporary total disability benefits at $299.02 per week for the period February 22, 1999 through April 27, 1999.

2. Employer shall pay permanent partial disability benefits at $299.02 per week for the period March 29, 2000 to March 26, 2002. Thereafter, liability rests retroactively with the Special Fund.

3. Employer shall provide Claimant with reasonable medical care which may become necessary for his July 25, 1998 injury, under Section 7 of the Act.

4. Any petition for attorney's fees and costs must be prepared on a line item basis and comply with 20 C.F.R. § 702.132 in order to be considered. It must be filed within twenty days after service of this Order by the District Director. If a fee petition is filed by Claimant, any objection(s) by Employer shall be stated on a line item basis; the objection(s) shall include the reason for the objection and any supporting explanation Employer wishes to offer. Objections shall be filed within ten days after the fee petition is deemed received, based on the rules for service of documents by U.S. mail. Items which are not the subject of an objection in the manner required will treated as admitted, and will be allowed. The parties shall then meet and confer within 10 days, at an hour and place arranged by counsel for Claimant, in an effort to eliminate or settle the objections. Within 10 days after that meeting, for objections not resolved, counsel for Claimant may file a line item response dealing with the remaining objections. The response shall state the date the meeting of counsel took place.

5. All appropriate computation of benefits and other calculations which must be made to carry out this order are subject to verification and adjustment by the District Director.

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William Dorsey
Administrative Law Judge